Note

DEFINING AND PUNISHING ABROAD: CONSTITUTIONAL LIMITS ON THE EXTRATERRITORIAL REACH OF THE OFFENSES CLAUSE

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INTRODUCTION

The Offenses Clause of the United States Constitution gives Congress the authority to "define and punish . . . Offences against the Law of Nations."[1] This Note considers whether Congress must conform to the jurisdictional rules of customary international law when legislating pursuant to the Offenses Clause.

If a French citizen kidnaps a Russian—or even an American—in Italy, she not only commits a crime under Italian law, but a crime under customary international law, or the "law of nations."[2] Yet, if the United States takes custody of the kidnapper, and prosecutes and convicts her in federal court, a subsequent attempt by the United States to impose punishment would be problematic under customary international law. In the absence of a treaty,[3] international law generally does not permit kidnapping to be punished by nations having no connection to the crime itself,[4] or by nations whose only

1. U.S. CONST. art. I, § 8, cl. 10.

2. Customary international law, or the "law of nations," is the law regulating interactions between nations, and, in some instances, between nations and individuals. For a fuller discussion of the scope of customary international law, see *infra* Part I.A. Kidnapping is a violation of customary international law. *See* Timothy D. Rudy, *Did We Treaty Away* Ker-Frisbie*?*, 26 ST. MARY'S L.J. 791, 799-800 (1995).

3. Although treaties covering the problems presented herein exist, they are ignored for the purposes of this Note. This Note is concerned only with the interaction between customary international law and constitutional law in the absence of treaties.

4. There are, however, a few exceptions to this general rule. The United States can, for example, assert jurisdiction over crimes threatening central U.S. interests, *see infra* notes 29-31 and accompanying text (discussing protective jurisdiction), and crimes so egregious as to merit

connection is that the victim is of the same nationality.[5] This Note examines whether the assertion of federal jurisdiction over the kidnapper might violate not only international law, but the U.S. Constitution as well.

The Offenses Clause is unlike other constitutional clauses because it refers to a body of law independent of federal or state law and the American democratic process: the law of nations. This Note concludes that this unique reference implies unique limitations. Since the Offenses Clause incorporates principles of customary international law into the Constitution, Congress must abide by those principles when it relies on the Offenses Clause as the sole source of authority for legislation.[6]

Congressmen and academics have invoked the Offenses Clause with increasing frequency in the past few decades to support a series of statutes that incorporate international law into domestic law.[7]

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universal jurisdiction, *see infra* notes 32-37 and accompanying text.

5. *See infra* notes 42-46 (discussing passive personality jurisdiction).

6. In all other situations, international law is only controlling in the absence of other authority. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("*Though it clearly has constitutional authority to do so*, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.") (emphasis added); The Paquette Habana, 175 U.S. 677, 700 (1900) (stating that international law controls "where there is no treaty and no controlling executive or legislative act or judicial decision"); United States v. Merkt, 794 F.2d 950, 964 n.16 (5th Cir. 1986) (stating that Congress was not bound by international law in enacting a refugee statute); American Baptist Churches v. Meese, 712 F. Supp. 756, 771 (N.D. Cal. 1989) ("Congress is not constitutionally bound to abide by precepts of international law, and may therefore promulgate valid legislation that conflicts with or preempts customary international law."). *But see* United States v. Columba-Colella, 604 F.2d 356, 360 (5th Cir. 1979) (limiting federal jurisdiction over a car theft case in Mexico because asserting jurisdiction would violate international law).

Though Congress is not bound by international law, one canon of statutory construction requires courts to give unclear statutes a reasonable interpretation that is consonant with international law. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."). A separate but related canon of construction says that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

7. The Offenses Clause was invoked as providing constitutional support for the nationality-based jurisdictional provisions of the International Anti-Bribery and Fair Competition Act of 1998, *see* S. REP. NO. 105-277, at 5 (1998); the War Crimes Act of 1996, *see* H.R. REP. NO. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172; and the Torture Victim Protection Act of 1991, *see* S. REP. NO. 102-249, § III, at 5 (1991). For academic references, see Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 513 (1994) ("The nationality of an alleged offender is apparently irrelevant under this constitutional grant of authority . . . ."); Patrick L. Donnelly, Note, *Extraterritorial Jurisdiction over Acts of Terrorism Committed*

Admittedly, all of these statutes could be grounded in treaties or other constitutional provisions. The repeated invocation of the Clause, however, raises questions as to whether it permits statutes with provisions for extraterritorial jurisdiction exceeding that permitted by customary international law. Academic honesty, as well as the fact that Congress may enact legislation based solely on the Offenses Clause, compels this examination.

To give some context to the question addressed in this Note, Part I introduces the rudiments of customary international law and its jurisdictional principles. Part II then employs history, text, constitutional structure, and case law to show that customary international law limits the Clause's jurisdictional reach.

I. CUSTOMARY INTERNATIONAL LAW AND ITS JURISDICTIONAL PRINCIPLES

The law that the Offenses Clause invokes, once known as the "law of nations," is now more frequently called customary international law.[8] This part presents the basic principles of customary international law and provides a brief overview of the jurisdictional principles a nation might invoke to justify extraterritorial prosecutions.[9] It also discusses the interaction between substantive and jurisdictional law and the constitutional import of classifying jurisdictional principles as law instead of comity.

A. Customary International Law

International law regulates the relationships among nations, the relationships between nations and the international community, and,

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Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986, 72 CORNELL L. REV. 599, 609 (1987) ("The offenses clause thus extends jurisdiction beyond the limits allowed by customary international law.").

8. Although some legal academics and courts treat the two terms slightly differently, the majority use "law of nations" and "customary international law" interchangeably. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (treating the law of nations as synonymous with customary international law); Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (pt. 1), 29 J. MAR. L. & COM. 335, 380 (1998) (same); Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 51 (1998) (same).

9. Extraterritorial jurisdiction refers to a nation prosecuting a crime that occurred outside its physical borders.

in some instances, between nations and individuals.[10] There are two sources of international law: treaties and customary international law. Treaties are express agreements between nations. Although they are the basis of most domestic laws regarding international law violations, this Note does not address treaties or legislation passed pursuant to the Treaty Clause.[11] Customary international law, on the other hand, is grounded in the implicit consent of all civilized nations,[12] and governs in the absence of a treaty.[13] For something to constitute a rule of customary international law it must be consented to and practiced by all civilized nations.[14] There are no final arbiters of its scope: national courts, state courts, and international courts all consider laws in light of their own interpretations of customary international law.[15]

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10. *See* 45 AM. JUR. 2D *International Law* § 1 (1969) (defining international law "in its widest and most comprehensive sense" as regulating these relationships).

11. The Treaty Clause should be read in conjunction with the Necessary and Proper Clause. *See* U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution"). The treatymaking power is found in Article 2, Section 2 of the Constitution. Many treaties may violate international law in substance or jurisdiction by their overreaching, but as long as they concern matters of national interest, legislation passed to give them effect in this country will be upheld. *See* Missouri v. Holland, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."). One could argue that the Offenses Clause was meant to be merely a means by which treaties may be enacted into federal law. However, the Supreme Court has held that the power to pass national legislation in order to effect the terms of a treaty is grounded in the Necessary and Proper Clause. *See id.* Therefore, if Congress has made a treaty, the legislation passed pursuant to it need not be examined in the same way as legislation passed pursuant to the Offenses Clause.

12. The phrase "civilized nations" is used throughout the international law literature but has no clear definition. *See, e.g.*, M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 645 (3d ed. 1996) ("The prohibition against cruel and unusual punishment can be said to constitute a general principle of international law because it is so regarded by the legal systems of civilized nations."); Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 215 (1998) (discussing the "Lieber Code," the first government codification of the laws of war, issued by the United States during the Civil War); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 412 (1997) (quoting James Wilson's statement at the Constitutional Convention that "[t]o pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous").

13. *See* 45 AM. JUR. 2D *International Law* § 3 (1969).

14. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 776 (July 11) (Kreća, J., dissenting) (describing the process by which a rule becomes part of customary international law).

15. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 816 (D.C. Cir. 1984)

Like the Anglo-American common law, customary international law is organic;[16] because it is derived from the practice of nations, which is always changing, the content and scope of customary international law is constantly in flux.[17] In Blackstone's time, the law of nations concerned only "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[18] It now encompasses crimes such as genocide, war crimes, and crimes against humanity.[19]

American courts determine the scope and content of customary international law in many circumstances, including when adjudicating the terms of a treaty, or presiding over civil suits brought pursuant to statutes referencing the law of nations.[20] In deciding the scope of customary international law, courts examine "the customs and usages of civilized nations; and, as evidence of these, [look] to the works of jurists and commentators."[21] In this way, treaties and other

(interpreting tort law in light of customary international law); Republic of Argentina v. City of New York, 250 N.E.2d 698, 700-04 (N.Y. 1969) (interpreting tax law in light of customary international law); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1996 I.C.J. at 776 (Kreća, J., dissenting) (discussing the relationship between the laws of a sovereign nation and customary international law).

16. For a general overview of customary international law and its role in the international system, see MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES (1997).

17. *See* United States v. La Jeune Eugenie, 26 F. Cas. 832, 838 (C.C.D. Mass. 1822) (noting that the law of nations changes over time); HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 4 (1993) (stating that the crimes against peace and crimes against humanity are twentieth-century additions to the canon of customary international law); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 359-60 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*] (discussing questions raised by the changing content of the law of nations); Remarks of Louis Henkin (Apr. 3, 1998), *in International Law in a World of Multiple Actors: A Conversation with Louis Henkin and Louis B. Sohn*, 92 AM. SOC'Y INT'L L. PROC. 248, 259 (1998) (stating that the law of nations is changeable). *See generally* Josef L. Kunz, Comment, *The Changing Law of Nations*, 51 AM. J. INT'L L. 77 (1957) (describing the phenomena which lead to changes in the law of nations).

18. 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

19. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 818 (1997).

20. For instance, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), allows private suits for tortious violations of the law of nations. For a general overview of this Act, see Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.S. § 1350), Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (1993).

21. The Paquette Habana, 175 U.S. 677, 700 (1900); *see also* Hilao v. Estate of Marcos, 103 F.3d 789, 794 (9th Cir. 1996) (quoting *The Paquette Habana*); Nakeswaran v. I.N.S., No. 93-2135, 1994 WL 170801, at *1 (1st Cir. May 6, 1994) (same); de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1396 n.13 (5th Cir. 1985) (same); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1390 n.1 (10th Cir. 1981) (same). For an early expression of this same method,

agreements do not themselves create customary international law, but provide evidence of nations' compliance with a particular rule, and give concrete proof of a customary law's existence. In turn, customary international law informs the interpretation of treaty agreements.[22]

B. Types of Jurisdiction

Jurisdiction is "the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court."[23] This Note examines the contours of the first of these, Congress's power to affect the rights of individuals through legislation, also known as prescriptive jurisdiction.[24] Customary international law places limits on a nation's right to assert jurisdiction over crimes that occurred outside its territory. The degree of limitation depends on the nature of the crime. Scholars of international law generally recognize five primary principles that nations use to justify the exercise of jurisdiction: territorial, protective, universal, national, and passive personality.[25]

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see United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) ("What the law of nations . . . is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.").

22. *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 200 (1996) (noting that the Uruguay Round of the General Agreement on Tariffs and Trade directs that its interpretation be "mindful" of the customary rules of interpretation of international law); Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 75 AM. J. INT'L L. 142, 147 (1981) (observing that although the United States has not ratified the Vienna Convention on the Law of Treaties, it does apply those of its terms reflecting customary international law); *see also* Remarks of Harold Hongju Koh (Apr. 2, 1998), *in Contemporary Conceptions of Customary International Law*, 92 AM. SOC'Y INT'L L. PROC. 37, 37-41 (1998) (discussing the interaction between formal law and customary international law).

23. Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 241 (1923).

24. *See* IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 4-5 (1994) (distinguishing between "prescriptive" jurisdiction, which concerns the power to prescribe laws and regulations, and "enforcement" jurisdiction, which concerns the power of courts or other entities to perform acts pursuant to these rules); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (discussing prescriptive jurisdiction).

25. These principles were first outlined in a Harvard study done in 1935. *See Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935). For an example of a federal court's recognition of these principles, see *Rocha v. United States*, 288 F.2d 545, 549 n.4 (9th Cir. 1961). Some scholars recognize additional principles of jurisdiction: the "flag principle"

The territorial principle permits jurisdiction over all crimes committed within a nation's borders, regardless of the nationalities of the victim and the perpetrator.[26] At one point, territorial jurisdiction was the sole source of legitimate criminal jurisdiction over everything but the high seas.[27] Territorial jurisdiction is universally recognized as legitimate under customary international law for all crimes.[28]

The protective principle allows the assertion of jurisdiction when the national interest is threatened by an act, regardless of where that act occurs.[29] A limited range of crucial national interests are implicated, including threats to national security or the national treasury.[30] The protective principle is based on the theory that every nation has a right to defend against assaults on its sovereignty.[31]

(allowing jurisdiction on ships and airplanes registered in the country); the "representation principle" (allowing one country to stand in for another in the prosecution of a crime when the act is illegal in both places); and the "principle of distribution of competence" (allowing the state where the offense occurred to waive prosecution in favor of the offender's state of nationality or domicile). CAMERON, *supra* note 24, at 18.

26. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998).

27. *See infra* note 63.

28. *See* Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 177 (1997) ("There is little debate that a nation may exercise territorial jurisdiction over and thus promulgate laws regulating persons, things or transactions within the nation's territory."). Although Supreme Court decisions are not conclusive interpretations of international law, they provide important insights. In one of its early decisions, the Supreme Court held that "[l]egislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens." Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808). As recently as 1957, the Supreme Court stated that a "sovereign nation has *exclusive jurisdiction* to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." Wilson v. Girard, 354 U.S. 524, 529 (1957) (per curiam) (emphasis added).

29. *See* United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir. 1979) (dictum) (noting that U.S. courts "have jurisdiction to enforce criminal laws wherever and by whomever the act is performed that threatens the country's security or directly interferes with its governmental operations"); CAMERON, *supra* note 24, at 2 (defining the protective principle); *see also* United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968) (sustaining a conviction for false statements to a government official made outside the United States in connection with a visa application).

30. *See Columba-Colella*, 604 F.2d at 358 (dictum) ("A state/nation is competent . . . to punish one who has successfully defrauded its treasury, no matter where the fraudulent scheme was perpetrated."); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 15 n.7 (D.D.C. 1998) (stating that American "victims of foreign state sponsored terrorism" may invoke protective jurisdiction in civil actions against those governments based on the "national security interests" involved); *see also* CAMERON, *supra* note 24, at 3 (cataloging the various offenses that have been included within the scope of the protective principle); Monika B. Krizek, Note, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 B.U. INT'L L.J. 337,

The universal principle permits jurisdiction over certain crimes, such as genocide, that are universally offensive[32] and universally punished because of the extreme horror that they evoke.[33] Because such crimes threaten the very nature of humanity itself, every nation has the right, and perhaps the duty, to prosecute these crimes and prevent their recurrence.[34] However, it is important to distinguish between universal condemnation and universal jurisdiction. All crimes against customary international law are looked upon as illegal by the community of nations,[35] but this widespread condemnation does not translate into agreement that the crime should be subject to universal jurisdiction. Both genocide and the wearing of an enemy uniform[36] are universally recognized as against the laws of war but, between the two, only genocide merits universal jurisdiction.[37]

The two most controversial jurisdictional bases are the nationality principle and the passive personality principle. A court that used the nationality principle would allow a country to punish its own citizens for certain crimes regardless of where committed.[38] The U.S. Supreme Court has long recognized this jurisdictional theory, stating in 1824 that "[t]he laws of no nation can justly extend beyond

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337-46 (1988).

31. The Supreme Court has held that "criminal statutes . . . are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents." United States v. Bowman, 260 U.S. 94, 98 (1922). In *Bowman*, the Court ruled that a statute prohibiting false claims to the government or to corporations in which it held stock had extraterritorial application. *See id.*

32. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (stating, in the context of war crimes allegedly committed by a former Nazi concentration camp guard, that "some crimes are so universally condemned that the perpetrators are the enemies of all people," and concluding that "any nation which has custody of the perpetrators may punish them according to its law").

33. *See* Beverly Izes, Note, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should Be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 11 (1997) (outlining the theory behind universal jurisdiction).

34. *See id.*

35. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986) [hereinafter THIRD RESTATEMENT] ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

36. *See* Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469, 479 (1993) (citing the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 39(2), 16 I.L.M. 1391, 1409).

37. *See supra* notes 32-34 and accompanying text.

38. *See* CAMERON, *supra* note 24, at 17.

its own territories, except so far as regards its own citizens."[39] More recently, the Court observed that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."[40] However, jurisdiction based on nationality is not clearly recognized by the international community.[41]

Finally, the passive personality principle would permit jurisdiction based on the citizenship of the victim.[42] Passive personality jurisdiction would allow a nation to punish anyone who harms any of its citizens in violation of its laws, regardless of where the harm occurs.[43] This form of jurisdiction is still generally disfavored[44] and probably not a part of customary international law,[45] as nations tend to "jealously guard[]" their exclusive right to decide what is criminal on their own soil.[46]

Some lower courts in the United States have misunderstood the repeated articulation of these five principles to mean that all five

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39. The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

40. Johnson v. Eisentrager, 339 U.S. 763, 769 (1950).

41. *See* Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992) (discussing the United States's past reluctance to use the nationality principle and arguing for its greater application); Edmund S. McAlister, Note, *The Hydraulic Pressure of Vengeance:* United States v. Alvarez-Machain *and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449, 457-58 (1994) (noting that nations have differing approaches to nationality-based jurisdiction). Several federal statutes provide for jurisdiction based solely on the nationality of the offender, including the perjury, espionage, and tax evasion statutes. *See* Watson, *supra*, at 53 & nn.79-81 (citing 18 U.S.C. § 1621 (1994) (perjury); *id.* §§ 793-794 (espionage); 26 U.S.C. § 7201 (1994) (tax evasion)). Nationality jurisdiction is not justified in every circumstance, and it is most widely accepted when based on the duty or loyalty owed by citizens to their (prosecuting) homelands. *See* Estey, *supra* note 28, at 182.

42. *See* Rüdiger Wolfrum, *The Decentralized Prosecution of International Offences Through National Courts*, *in* WAR CRIMES IN INTERNATIONAL LAW 233, 234 (Yoram Dinstein & Mala Tabory eds., 1996) (defining passive personality jurisdiction); Carol S. Goldstein, Casenote, *Extraterritorial Jurisdiction of Federal Criminal Law: The Assassination of Congressman Ryan*, 14 LAW. AM. 61, 65 (1982) (same).

43. John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 FORDHAM INT'L L.J. 298, 299-300 (1989-1990).

44. *See* LEVIE, *supra* note 17, at 231 (noting that the passive personality principle is "extremely controversial"); Wolfrum, *supra* note 42, at 234 (stating that passive personality jurisdiction is "not generally recognized"). For a discussion of why passive personality is disfavored, see Jürgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L L.J. 108, 113-14 (1990).

45. *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 13 (1993) (noting that passive personality is not widely practiced and probably not an accepted form of jurisdiction under customary international law).

46. *See* CAMERON, *supra* note 24, at 6.

principles are legitimate under international law.[47] For example, in *United States v. Benitez*,[48] the Eleventh Circuit stated that "[t]he law of nations permits the exercise of criminal jurisdiction by a nation under five general principles."[49] The court went on to conclude that jurisdiction over Colombians who had shot DEA agents in Colombia was proper under the protective principle, but also stated that the passive personality principle would have been a sufficient basis for jurisdiction.[50] After correctly discussing the protective principle, which was indeed sufficient, the court added this troublesome dictum: "[T]he nationality of the victims, who are also U.S. government agents, *clearly* supports jurisdiction."[51] The court carelessly endorsed the passive personality principle as a viable principle under federal law, without considering whether it was legitimate under customary international law.

C. Jurisdictional Principles: Law or Comity?

It is unclear whether the jurisdictional principles discussed above are binding under international law. They are sometimes treated as if they are principles of comity—discretionary standards that have evolved over time to encourage courts to refrain from entering disputes that primarily involve other nations.[52] If that is the case, then they are not so much international *law* as international *conventions*, and nations are technically free to disregard them. Doing so might

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47. *See, e.g.*, United States v. MacAllister, 160 F.3d 1304, 1308 n.9 (11th Cir. 1998) ("The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles . . . . Extraterritorial application of penal laws may be justified under any of these five principles."); United States v. Rezaq, 134 F.3d 1121, 1133 (D.C. Cir. 1998) (applying the passive personality principle without acknowledging its precarious status under international law); Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967) ("The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles. They are the territorial, national, protective, universality, and passive personality principles.") (footnotes omitted). *But see* Neely v. Club Med Management Servs., 63 F.3d 166, 185 (3d Cir. 1995) (acknowledging that the passive personality principle "'has not been generally accepted for ordinary torts or crimes'") (quoting THIRD RESTATEMENT, *supra* note 35, § 402 cmt. g).

48. 741 F.2d 1312 (11th Cir. 1984).

49. *Id.* at 1316 (quoting *Rivard*, 375 F.2d at 885) (internal quotation marks omitted).

50. *See id.*

51. *Id.* (emphasis added).

52. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817-22 (Scalia, J., dissenting) (characterizing the jurisdictional rules as principles of comity); *see also* Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 527 (1994) ("[C]omity refers to diplomatic niceties performed by states out of a sense of international etiquette rather than binding obligation.").

offend other nations, but would not violate customary international law. On the other hand, if the jurisdictional principles are binding law, then a country that disregards them in bringing a prosecution violates international law.[53]

The difference between treating jurisdiction as law or comity is ordinarily semantic. The consequences of violating international jurisdictional principles are the same whether those principles are understood as law or comity.[54] However, in the context of the Offenses Clause, the distinction is vital because the Clause gives constitutional significance to the phrase "law of nations."[55] If the jurisdictional limits are not binding under international law, then they are not a part of the Offenses Clause. Conversely, if the law of nations includes jurisdictional limits, then so does the Offenses Clause. In that case, Congress must abide by those limits when legislating pursuant to the authority found in the Offenses Clause.

The more sensible interpretation of international law is that the jurisdictional limits are binding. A central purpose of international law is to define the relationships between countries, which it can only do in a meaningful way by the imposition of limits or substantial restraints on the ability of one country to act in ways that affect another.[56] If the jurisdictional principles are only discretionary, any violation of international law could be punished by any nation,

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53. For a discussion of the inconsistent ways in which violations of international law are litigated and punished in international forums, see BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED CASEBOOK 214-50 (3d ed. 1997).

54. In the United States, international law only controls in the absence of other controlling authority. *See* The Paquette Habana, 175 U.S. 677, 700 (1900) (stating that international law controls "where there is no treaty and no controlling executive or legislative act or judicial decision"). However, courts may still employ international law as a tool of statutory construction, presuming that Congress will not legislate in violation of international law. *See* Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (citing Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .")); *see also* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1110 (1990) ("It is plain, however, that the interpretive role of international law is more common than its controlling role."). As a discretionary aid to interpretation, then, principles of international law gain force from their persuasiveness, not their status as either law or comity.

55. U.S. CONST. art. I, § 8, cl. 10.

56. *See* Hersch Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31 (1931) ("International law is not concerned with matters of municipal law; it is concerned with relations between States."), *quoted in* L. Amede Obiora, *Toward an Auspicious Reconciliation of International and Comparative Analyses*, 46 AM. J. COMP. L. 669, 671 (1998).

regardless of location or connection to the prosecuting country. Since theft is universally condemned, international law would not prevent the United States from prosecuting French thieves. This is troubling not only for the Frenchman who finds himself subject to punishment across the globe for a crime committed at home, but for the sovereignty of France as well. In most circumstances, enlightened self-interest, as well as comity, keeps one nation from intruding on the affairs of another. The United States generally has no interest in prosecuting French thefts. However, if it developed such an interest, comity would not provide a sufficient restraint. For international law to serve a meaningful role, it must set its own limits, and the jurisdictional limits must be as binding as the substantive limits.

II. THE OFFENSES CLAUSE IMPLICITLY INCORPORATES THE JURISDICTIONAL LIMITS OF CUSTOMARY INTERNATIONAL LAW

In recent years, Congress has passed a series of statutes incorporating international law.[57] One of the most striking attributes of these laws is that they allow for broad criminal jurisdiction over acts occurring outside the United States. Several statutes include provisions allowing for jurisdiction based on the nationality of the offender or the victim,[58] both of which rely on questionable jurisdictional principles.[59] The Offenses Clause was invoked in congressional debate as an independent source of authority for several of these statutes, but the scope of jurisdiction permitted by the Clause was never raised.[60]

Congress is generally unrestrained by the jurisdictional principles of international law.[61] It may choose to comply with them or ignore them, but such choice does not typically implicate

57. *See* International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C.A. § 78dd-1 note (West Supp. 1999); War Crimes Act of 1996, 18 U.S.C. § 2441 (Supp. III 1997); Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1994).

58. *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (Supp. III 1997) (authorizing extraterritorial jurisdiction for offenses by or against United States nationals); Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175 (1994) (same).

59. *See supra* notes 38-46 and accompanying text.

60. The author found no extensive discussion of the scope of the Offenses Clause in any of the congressional testimony cited *supra* note 7; the Clause was simply invoked and unquestioned.

61. In the United States, international law governs "only where there is no treaty and no controlling executive or legislative act or judicial decision." Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1447 (5th Cir. 1993) (internal quotation marks omitted).

constitutional concerns. However, this Note argues that by explicitly addressing a separate body of law—the law of nations—the Offenses Clause raises a unique exception to the general rule. No other provision of the Constitution refers to a separate body of law in this way.

There are three plausible readings of the scope of congressional power when legislating pursuant to the Offenses Clause. First, Congress might be completely unrestrained by international law. In other words, Congress may independently "define" both substantive offenses and jurisdictional rules. Second, under an "unfettered jurisdiction" model, the Offenses Clause may require that Congress follow the substance of the law of nations, but leave Congress free to create jurisdictional rules. Finally, under a "limited jurisdiction" model, the Offenses Clause may incorporate both the substantive and jurisdictional rules of international law. The following sections explore the merits of the latter two[62] of these perspectives in light of history, constitutional text and structure, and case law.

A. History

In the eighteenth century, sovereign jurisdiction almost never extended beyond a nation's borders.[63] Maritime jurisdiction, consent, and some cases of treachery abroad were among the few exceptions to the general rule of territorial jurisdiction.[64] Therefore, the absence

62. Charles Siegal has persuasively dismissed the first model, arguing that legislation based on the Offenses Clause must be substantively based on principles of international law. *See* Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 VAND. J. TRANSNAT'L L. 865, 886 (1988) ("[W]hile progressiveness and flexibility are built into the Offenses Clause, there are limits beyond which Congress may not go . . . . There must be an international law offense, with some reasonable degree of substance.").

63. *See* Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 17, at 361 ("[E]xtraterritorial regulation would have been unthinkable in the eighteenth century, a time when each nation's regulatory power was limited to conduct either within the nation's territory or by the nation's citizens."); *see also* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 493-97, 549-50 (3d ed. 1996) (discussing the nineteenth-century view that international law imposed territorial limits on jurisdiction); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-98 (1986) (outlining the arguments surrounding the debate and enactment by the First Congress of the Alien Tort Claims Act, originally a component of the Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1789) (codified as amended at 28 U.S.C. § 1350 (1994)), which gives federal courts subject matter jurisdiction over civil actions by aliens for torts committed in violation of the law of nations or a U.S. treaty).

64. *See* Alfred Paul LeBlanc, Jr., Note, United States v. Alvarez-Machain *and the Status of International Law in American Courts*, 53 LA. L. REV. 1411, 1473 (1993) (discussing admiralty

of an explicit textual limitation on extraterritorial jurisdiction in the Constitution can probably be attributed to the fact that no one thought it necessary.

Moreover, the Framers understood the law of nations to be based on natural law conceptions of absolute right and wrong,[65] and thus binding on all nations.[66] There is no reason to suppose its jurisdictional aspects were accorded any less weight. Therefore, the Offenses Clause was probably only meant to allow legislation that complied with the jurisdictional principles of international law.

The specific history behind the drafting of the Offenses Clause, though sparse, clarifies its meaning. The history indicates that the Offenses Clause was designed to serve two primary purposes: to ensure federal control over international relations, and to enable Congress to codify unclear international law.

The Articles of Confederation provided the central government with the power to establish courts that could hear cases involving piracies and crimes committed on the high seas,[67] but did not confer the power to define or punish violations of international law. This omission was perceived as a serious shortcoming because it meant that each state could control its own relations with foreign nations.[68]

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and maritime jurisdiction).

65. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822 (1989) ("In the eighteenth century a consensus existed that the law of nations rested in large measure on natural law."); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1131 (1985) ("The framers' conception of fundamental international law, however, was derived largely from natural law theory."); Siegal, *supra* note 62, at 868 n.12 ("[T]he basis of much eighteenth century American constitutional theory rested on the natural law concepts of such international law writers as Pufendorf, Burlamaqui, Vattel, and Rutherforth."). Natural law has been described as a set of rules "prescribed by an authority superior to the state . . . derived from divine commandment, from right reason with which man is endowed by his Creator, from the nature of mankind empirically regarded, from the abstract Reason of the Enlightenment, or from the long experience of humankind in community." Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994).

66. *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984) ("The law of nations of the time was not seen as something imposed on the states by the new [federal] government; it had been binding on and accepted by the states before the [central] government was even established."); Jay, *supra* note 65, at 827 ("Jurists of this era also typically recited that as to its obligatory elements the law of nations could not be violated by positive enactments.").

67. *See* Articles of Confederation art. IX (1781).

68. *See* THE FEDERALIST NO. 42, at 272 (James Madison) (Edward Mead Earle ed., 1976) ("These articles contain no provision for the cases or offenses against the law of nations; and consequently leave it in the power of any indiscrete member to embroil the Confederacy with foreign nations.").

This arrangement had the potential to threaten the union, as a single state could unilaterally offend other countries and bring war upon the federation.[69]

A noteworthy incident in the early 1780s may have influenced the formulation of the Offenses Clause. A Frenchman named De Longchamps insulted and struck the cane of Marbois, the French Counsel General to Pennsylvania in 1784.[70] The incident caused international unrest,[71] but the Continental Congress had no authority to punish the offender.[72] Foreign ministers complained, "demand[ing] that Congress declare the law of nations to be part of the common law of each of the states."[73]

Shortly thereafter, the first draft of the Constitution vested Congress with the power "*[t]o declare the law* and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and *of offenses against the law of nations.*"[74] A following draft—supposed to be the final draft—allowed for Congress to "*define and punish* piracies . . . and *punish* offences against the law of nations."[75] However, the Committee of Style voted to reconsider the phrasing,[76] which led to a debate between Governour Morris and James Wilson.

Morris proposed to change the sentence structure so that "define and punish" would apply to both piracies and offenses against the law

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69. *See* Michael J. Glennon, *Raising* The Paquette Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 333 & n.79 (1986) (discussing the Framers' fears that "the absence of legislative authority to punish offenses against international law . . . would permit reckless citizens and states to entangle the United States in conflicts with foreign nations").

70. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 111 (Pa. Ct. Oyer & Terminer 1784); Casto, *supra* note 63, at 491-94 (describing the incident and its influence on the Constitutional Convention).

71. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 24 (1985) ("The [De Longchamps] incident drew irate responses from the foreign ministers of France and other nations.").

72. *See id.* at 25 ("The attack on Marbois brought to light one of the deficiencies in the government constituted by the Articles of Confederation. The central government had no executive or judicial departments and obviously was incompetent to deal with the situation."). However, Pennsylvania did heed a congressional request to take the matter seriously, imprisoning De Longchamps for over two years. *See De Longchamps*, 1 U.S. at 118.

73. *See* Randall, *supra* note 71, at 24 (quoting Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. HIST. & BIOG. 294, 296 (1939)) (internal quotation marks omitted).

74. 1 DRAFTING THE U.S. CONSTITUTION 890 (Wilbourn Benton ed., 1986) (emphasis added).

75. *Id.* at 931 (emphasis added).

76. *See id.* at 932.

of nations.[77] Wilson objected: "To pretend to *define* the law of nations which depended on the authority of all the Civilized nations of the World, would have a look of arrogance, that would make us ridiculous."[78] Morris responded that the use of the word "define" was appropriate for the "law of nations" because "the law of *nations* [was] often too vague and deficient to be a rule."[79]

Morris was concerned that the "law of nations" would be too imprecise to constitute federal law, and wanted to ensure that Congress had the power—and even the responsibility—to codify specific crimes. His proposal passed by a close vote of six to five.[80] The final form, as it exists in the ratified Constitution, empowers Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[81]

The Offenses Clause generated little negative attention during the ratification debates. However, the Anti-Federalist "Cincinnatus" did write an argumentative open letter to James Wilson:

> [T]he proposed Congress are empowered to define and punish offences against the law of nations—mark well, Sir, if you please, define and punish. Will you, will anyone say, can anyone even think that does not comprehend a power to define and declare all publications from the press against the conduct of government, in making treaties, or in any other foreign transactions, an offence against the law of nations?[82]

"Cincinnatus" expressed concern that the Offenses Clause had the capacity to swallow up other protections, in particular those of free speech. He worried that the grant of power was so broad that Congress could use it to restrict the freedoms of speech and the press by "defining" anti-treaty propaganda as an "offence against the law of nations."

The concerns voiced by Wilson and expounded upon by "Cincinnatus" were not answered by their opponents. In the

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77. *See* 2 JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, 563 (Gallard Hunt & James Brown Scott, eds. 1987) ("Mr. Gov'r. Morris moved to strike out 'punish' before the words 'offences agst. the law of nations,' so as to let these be *definable* as well as punishable, by virtue of the preceding member of the sentence.").

78. *Id.*

79. *Id.*

80. *See id.*

81. U.S. CONST. art. I, § 8, cl. 10.

82. Letter from "Cincinnatus" to James Wilson, N.Y. J., Nov. 1, 1787, *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST 7, 8 (Herbert J. Storing ed., 1981).

Federalist Papers, Hamilton, Madison, and Jay each referred to the Clause,[83] but never discussed its scope. Its importance to the Federalists lay in ensuring stability among the states in international affairs so that a rogue state could not bring war on the others.[84] In *The Federalist No. 3*, for example, Jay addressed concerns about security, arguing that the federal government was best suited to protect citizens from external hostilities.[85] He argued that "[i]t is of high importance to the peace of America, that she observe the laws of nations towards all these Powers."[86] Only the national government would not be infected by that "pride of states," which could spur action against other nations upon the slightest perception of a violation of international law.[87]

So the Offenses Clause was designed to have two roles: (1) to ensure that control over international affairs remained with the central government, not the individual states; and (2) to enable Congress to clarify unclear international law. It was not intended to grant Congress the power to create its own version of international law, or to employ some of its provisions and not others. The history reveals a relatively unambitious clause intended to do little work, and therefore supports the more constrained "limited jurisdiction" reading.

The "unfettered jurisdiction" interpretation, on the other hand, would not fit with the Framers' understanding of the role of nations in international affairs. If the Clause carries no jurisdictional limitations, Congress could "define" any act that violates the law of nations, such as wearing an enemy uniform, as meriting extraterritorial jurisdiction.

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83. *See* Glennon, *supra* note 69, at 333 n.79 (highlighting Hamilton's concern that if the federal government lacked the exclusive power to define and punish offenses against the law of nations, "'the faith of the United States may be broken, their reputation sullied, and their peace interrupted by the negligence or misconception of any particular state'") (citation omitted). Madison predicted that a rogue state could "embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42, *supra* note 68, at 272. John Jay also addressed the Clause in *The Federalist No. 3*. *See infra* notes 85-87 and accompanying text.

84. *See* Glennon, *supra* note 69, at 333.

85. *See* THE FEDERALIST NO. 3, at 13-17 (John Jay) (Edward Mead Earle ed., 1976). *The Federalist No. 42* and *The Federalist No. 80* contain other discussions of the Offenses Clause.

86. *Id.* at 14. The "powers" to which Jay referred were those countries with which the United States had signed treaties.

87. *See id.* Madison agreed that the federal government was the proper body to administer the law of nations. *See* THE FEDERALIST NO. 42, *supra* note 68, at 272; *see also* Stephens, *supra* note 12, at 404-13 (arguing that the Framers drafted the Offenses Clause to ensure federal control over international affairs).

A consideration of the De Longchamps affair—a likely stimulus for the creation of the Clause—is instructive. Although the Court in that case stated that "[w]hoever offers any violence to [a diplomat] . . . is guilty of a crime against the whole world,"[88] jurisdiction was in fact based on the territorial principle, not the universal principle. Under the "unfettered jurisdiction" model, however, a modern De Longchamps could be punished under federal law for tapping Marbois's cane and telling him "je vous deshonnerera!"[89] whether the incident occurred in the United States or in Sweden.

To the extent that the Offenses Clause was an attempt to ensure effective punishment in case of future international incidents occurring on American soil,[90] extraterritorial jurisdiction of any sort was unnecessary because territorial jurisdiction would suffice. Moreover, conferring jurisdiction that exceeds that permitted by international law could cause a similar uproar in the international community.[91] The De Longchamps situation was embarrassing because Congress did not have the power to enforce international law within the United States; there would have been no uproar had the incident occurred in Spain. A clause designed to promote compliance with international law should not be read so as to confer the power to violate that law.

B. Text

This section explores the role of text—both the text of the Offenses Clause and that of surrounding constitutional provisions—in interpreting the Clause according to the two perspectives set forth above. Although the text is vague, the more sensible reading favors the "limited jurisdiction" interpretation.

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88. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Pa. Ct. Oyer & Terminer 1784).

89. *See id.* at 111; *supra* note 70 and accompanying text.

90. *See* Casto, *supra* note 63, at 492 ("The [De Longchamps] Affair was a national sensation that attracted the concern of virtually every public figure in America."); *see also id.* at 492-94 & n.143 (recounting the concern expressed over the incident both at the Constitutional Convention and by individuals such as George Washington, Thomas Jefferson, and James Madison).

91. *But see* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1252 (1992) ("The drafters of this clause may well have anticipated its application to cases with no overt connection to the United States, for . . . most offenses against the law of nations would have no nexus with American territory.").

1. *The Offenses Clause*. In terms of jurisdiction, the most notable attribute of the Offenses Clause is what it lacks. Nowhere is Congress given the power to "define" anything but "offenses." It is not given the power to define jurisdiction. Given that both substantive crimes and the appropriate jurisdictional rules are fundamental aspects of international law, the absence is conspicuous. After all, jurisdictional limitations are just as vital to international relations as the substantive rules to which they relate. If there is no grant of power to express jurisdictional limits, Congress must legislate within the existing limits provided by customary international law. The absence of a jurisdictional grant implies that Congress can "define" offenses, but not jurisdiction.

Admittedly, the text could also support the "unfettered" interpretation. The words "define" and "punish" are both susceptible of broad readings, possibly granting Congress unlimited power to proscribe any acts in any manner, unconstrained by the law of nations. Moreover, the first part of the Clause, referring to "piracies,"[92] has both substantive and jurisdictional components. Congress can punish piracies (a substantive grant of power) committed on the high seas (a jurisdictional limitation). The Offenses Clause, however, is without a corresponding limit: Congress can punish offenses against the law of nations (a substantive grant) . . . anywhere? This reading would essentially grant Congress the power to define and punish offenses against the law of nations *wherever they occur*.

However, this "unfettered jurisdiction" reading forces an interpretation of the Clause whereby the power to enforce the law of nations could be used to violate that same law. For instance, it would permit Congress to outlaw all assaults against diplomats without a jurisdictional limit. But the United States could not enforce such a law against a foreigner who assaulted a non-U.S. citizen outside of the United States without violating the jurisdictional rules of the law of nations. Also, adding an express textual qualification would have been needlessly redundant. Imagine if the Clause read as follows, granting Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations *as circumscribed by the Law of Nations*." No reference to jurisdiction was necessary because it was clearly implied by context.

92. "The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas . . . ." U.S. CONST. art. I, § 8, cl. 10.

2. *Other Clauses*. Related provisions clarify the place of the Offenses Clause in the constitutional vision of the Framers. Several clauses implicitly address the role of the United States in the international community. For example, the first clause of Article I, Section 8, empowers Congress to "provide for the common Defence and General Welfare of the United States."[93] By according Congress the power to protect the welfare of the United States, this clause counsels against legislation whose purpose is the defense of citizens and entities unrelated to this country.

The Declaration Clause grants Congress the power to "make Rules concerning Captures on Land and Water."[94] The substantive grant of power is clear: the rules made pursuant to the Clause must concern land or water capture. According to its simple terms, the Clause could allow Congress to make rules concerning capture (by anyone) on (any) land or (any) water. However, despite the absence of any explicit jurisdictional limitation on the Clause, the most sensible reading implicitly limits it to captures of enemy troops by U.S. soldiers. Otherwise, Congress could make rules for Japan's capture of enemy troops. Besides being futile, such rulemaking would clearly violate international norms. Likewise, the constitutional ability to "make rules for the regulation of land and naval forces"[95] can apply only to U.S. forces. This has never been litigated because Congress would never even debate whether it should make rules for the Japanese army.

The Offenses Clause should be read in a similar way. A limit on its jurisdictional reach should be implied such that it extends only as far as the law of nations allows. Just as it seems sensible to assume that the Declaration Clause is not meant to allow Congress to prescribe rules for foreign troops, it seems equally sensible to assume that the Offenses Clause does not authorize punishments of international crimes where the punishments themselves are international crimes. For example, wearing an enemy uniform during attack violates the law of nations.[96] But an American prosecution of a Turkish soldier for wearing a German uniform would also violate the law of nations, which prohibits countries from interjecting themselves

93. *Id.* art. I, § 8, cl. 1.

94. *Id.* art. I, § 8, cl. 11.

95. *Id.* art. I, § 8, cl. 13.

96. *See supra* note 36 and accompanying text.

into other quarrels.[97] A clause intended to promote compliance with international law should not be read so as to facilitate violations of that law.

C. Sovereignty, Structure, Context, and Policy

This section discusses the nature of sovereignty, constitutional structure, the antipathy to police power, and policy considerations as they relate to the best reading of the Offenses Clause. All of these indicate that Congress should not have unfettered discretion to pick and choose jurisdictional principles when legislating pursuant to the Clause.

The nature of sovereignty itself implies a jurisdictional limitation in the Clause. Although we have a limited federal government, there are certain powers, inherent in the very idea of sovereignty, that can be exercised despite the absence of a specific grant of power.[98] For example, the Supreme Court has held that there is implicit congressional power to legislate in furtherance of domestic interests in foreign affairs: "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."[99] The idea of powers inhering in the nature of sovereignty has been drawn on in other areas and is rooted in the practices of nations over time.[100] But if Congress accepts the implied powers of sovereignty, it follows that it must also accept the implied limitations, one of which is

97. Exercising jurisdiction in this manner would be a violation of the law of nations in all but the most egregious circumstances, in which case universal or protective jurisdiction might be appropriate. *See supra* Part I.B.

98. With these inherent powers come inherent responsibilities. *See infra* note 101.

99. Perez v. Brownell, 356 U.S. 44, 57 (1958).

100. *See* Lobel, *supra* note 65, at 1131-33 (discussing the inherent powers of sovereignty possessed by the political branches of the federal government) (citing *Perez*, 356 U.S. at 57 (holding that Congress has the implied power to "enact legislation for the effective regulation of foreign affairs"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."); Jones v. United States, 137 U.S. 202, 212 (1890) (holding that the power to exercise dominion and control over new territories is held by all civilized countries by virtue of the law of nations); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (holding that the power to exclude aliens is "an incident of sovereignty")).

compliance with international law.[101] Although other constitutional grants of power may enable Congress to violate international law,[102] the Offenses Clause—designed to promote conformity with international law—should not.

The Preamble provides another hint as to the proper reading of the Offenses Clause, stating: "[w]e the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."[103] By its focus on "domestic tranquility" and "common defence," the Preamble encourages a reading of the subsequent grants of power in terms that are inward-looking, rather than outward-looking. Read in this light, the Offenses Clause should not provide for unlimited extraterritorial jurisdiction.

One might argue that domestic tranquility and common defense are ends, not means, and if they can be secured by exercising universal jurisdiction over certain crimes, regardless of whether international law sanctions such an assertion of jurisdiction, then the Preamble is satisfied. However, by definition, crimes that require universal jurisdiction have little connection to the United States.[104] The inward-looking focus of the Preamble provides a lens through which to interpret the rest of the Constitution. In that light, it counsels against asserting jurisdiction when American interests are not implicated—a reading that incorporates the limited jurisdictional principles of customary international law.

The Clause should also be informed by the Framers' wariness of excessive police power.[105] It seems unlikely that they would have granted unlimited power over a field of criminal law given the

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101. *See id.* The Framers understood this dynamic. As Chief Justice, John Jay explained that "'[w]e had become a nation—as such, we were responsible to others for the observance of the *Laws of Nations*.'" Jay, *supra* note 65, at 825 (quoting Chief Justice Jay's Charge to the Grand Jury for the District of New York (April 4, 1790)); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) ("[B]y taking a place among the nations of the earth, [the United States had] become amenable to the laws of nations.").

102. *See supra* note 6.

103. U.S. CONST. preamble.

104. If the crime involved central national interests it would be subject to protective jurisdiction, and if it involved an American victim or perpetrator it would be subject to passive personality or nationality jurisdiction, so long as those bases are accepted under international law. *See supra* Part I.B.

105. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (discussing the Framers' attempt to prevent tyranny through constitutional structure).

potential threat to liberty. In fact, the Constitution includes several checks against a broad federal police power, such as the specific and limited definition of treason.[106] The Framers are unlikely to have so carefully restricted the scope of treason, yet left the field of crimes against the law of nations wide open. Otherwise, the power to "define" crimes could be abused to punish political enemies, exercise undue control over distant lands,[107] or become excessively entangled in foreign political controversies, all with the attendant risks of war.

D. Case Law

The majority of cases that have addressed the Offenses Clause have focused on Congress's ability to outlaw, or delegate the power to outlaw, violations of the law of nations without specifying the elements of the offense. Although the cases demonstrate extreme deference to congressional delegations of the Offenses Clause power, they consistently suggest that the Clause can only be used in conformity with international law because the law of nations is exterior to the United States and not changeable by Congress. Although no Supreme Court case is directly on point, a few provide a helpful background.

In *United States v. Smith*,[108] a defendant challenged his conviction under a federal statute outlawing "piracy, as defined by the law of nations."[109] The statute did not set forth the elements of piracy, and the defendant argued that the Piracy Clause[110] required Congress to "define" the crime more exactly.[111] Justice Story, for the majority, exhaustively examined the crime of piracy in international law, investigating whether international law specified piracy to such a degree that Congress did not need to outline the elements of piracy in order to outlaw it.[112] He concluded that piracy was defined with

106. The Constitution provides that treason against the United States "shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3 (emphasis added).

107. Although the Constitution shows no real concern for noncitizens, the Framers themselves had been involved in a revolt from a distant government, in which they had no direct control, and which had exercised police power over them.

108. 18 U.S. (5 Wheat.) 153 (1820).

109. *Id*. at 157.

110. Congress is empowered to "define and punish Piracies and Felonies committed on the high Seas." U.S. CONST. art. I, § 8, cl. 10.

111. *See Smith*, 18 U.S. (5 Wheat.) at 156-57.

112. *See id.* at 158-65.

reasonable certainty by the law of nations, and that Congress did not misuse its power to define and punish when it outlawed piracy without specifying the elements of the crime.[113]

Although *Smith* did not directly concern the Offenses Clause, the decision is still revealing. Story distinguished piracy from felonies on the high seas and offenses against the law of nations which "cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations." He continued, "[i]n respect . . . to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish."[114] In other words, Story thought that the law of nations was too vague to support proscribing violations of it in general terms. If Congress was to outlaw crimes against the law of nations, it had the power, and the duty, to define those crimes with specificity.

The *Smith* dictum was rejected by the Supreme Court in the 1940s. In *Ex parte Quirin*[115] and *In re Yamashita*,[116] the Court concluded that Congress could exercise its Offenses Clause power to outlaw violations of the law of nations without expressing the specific elements of the crime. In *Quirin*, the Court held that a military commission had jurisdiction under the Constitution to try German saboteurs for violating the laws of war, a subset of the law of nations.[117] The petitioners in *Quirin* were trained German saboteurs who landed in the United States to destroy military facilities during World War II.[118] They were apprehended and charged with violating the laws of war[119] by a military justice commission established by the President.[120]

The saboteurs argued that the President did not have the constitutional authority to create the military tribunals.[121] Such authority, they claimed, belonged to Congress alone.[122] The Court

113. *See id.* at 158.

114. *Id.* at 159.

115. 317 U.S. 1 (1942).

116. 327 U.S. 1 (1946).

117. *See Quirin*, 317 U.S. at 25.

118. *See id.* at 21.

119. *See id.* at 23.

120. *See id.* at 22-23. Throughout the trial and the habeas corpus proceedings, Germany and the United States remained at war.

121. *See id.* at 24.

122. *See id.* at 9.

examined the various presidential and congressional duties and responsibilities conferred by the Constitution regarding the laws of war,[123] and concluded that Congress had implicitly—and acceptably—delegated its Offenses Clause authority.[124] The Court held that Congress had properly employed its power to "define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."[125] The Court judged this delegation of the Offenses Clause power not only by constitutional standards, but in terms of the law of nations. The military commission's trial was deemed to be acceptable because it was held "according to the rules and precepts of the law of nations."[126]

In *Yamashita*, the Court affirmed the holding and reasoning of *Quirin*. The Court considered the jurisdictional basis of American military commissions charged with the trials of war criminals abroad.[127] Yamashita was a military commander charged with failing to keep his troops from committing war crimes. The prosecution argued that the alleged atrocities were so widespread that they must have been either willfully permitted or secretly ordered.[128] Yamashita petitioned for a writ of habeas corpus, arguing that the military commissions had no jurisdiction to try him.[129]

The Court rejected Yamashita's claims and upheld the authority of the military to try him. The Court considered the Articles of War, which stated that "'conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders of offenses that by statute *or by the law of war* may be triable by such military commissions . . . .'"[130] The Court paused to assess the charges against Yamashita and noted that "the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war."[131] In both cases, the

123. *See id.* at 25-28.
124. *See id.* at 28.
125. *Id.*
126. *Id.*
127. *See In re* Yamashita, 327 U.S. 1 (1946).
128. *See id.* at 13-14.
129. *See id.* at 5-6.
130. *Id*. at 7 (quoting Act of June 4, 1920, ch. 227, 41 Stat. 759, 790) (emphasis added).
131. *Id.* at 17.

Court's judgment of the constitutional issue was informed by its understanding of the international law issue.

The Offenses Clause was not considered again by the Supreme Court until *Boos v. Barry*.[132] In *Boos*, the Court considered a statute prohibiting the display of protest signs within five hundred feet of foreign embassies in the United States.[133] Before a thorough discussion of the First Amendment issues, Justice O'Connor summarily stated that the law was enacted pursuant to the Offenses Clause.[134] She elaborated that "the United States has a vital national interest in complying with international law. The Constitution itself tries to further this interest by expressly authorizing Congress '[t]o define and punish . . . Offenses against the Laws of Nations.'"[135] Although not necessarily inaccurate, the Court failed to critically evaluate whether the Offenses Clause was intended to authorize such statutes.[136]

While the preceding cases afford broad deference to congressional actions under the Offenses Clause, that deference only makes sense because there is another limitation. Congress need not codify the elements of crimes against the law of nations because those crimes are independently limited by the external understandings of customary international law.[137]

CONCLUSION

Two trends have emerged in the last few decades regarding U.S. lawmaking that concerns international law. First, the U.S.

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132. 485 U.S. 312 (1988).

133. D.C. CODE ANN. § 22-1115 (1981) (repealed 1988).

134. *See Boos*, 485 U.S. at 316 ("Congress enacted § 22-1115 in 1938 . . . pursuant to its authority under Article I, § 8, cl. 10, of the Constitution to 'define and punish . . . Offenses against the Law of Nations.'"). The concurrence and the dissent also accepted without question that Congress had authority to enact the statute pursuant to the Offenses Clause. *See id.* at 334 (Brennan, J., concurring); *id.* at 338 (Rehnquist, C.J., concurring and dissenting).

135. *Id.* at 323 (quoting U.S. CONST. art. I, § 8, cl. 10).

136. *Cf.* Siegal, *supra* note 62, at 929 ("[D]espite the framers' limited conception of the offenses clause, the courts have given Congress broad discretion to define offenses against the law of nations.").

137. *See Ex parte* Quirin, 317 U.S. 1, 30 (1942). Specifically, the Court stated:

> Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

Id.

government has aggressively prosecuted aliens for crimes against international law, such as torture and genocide, even when the crimes did not involve the United States, and even when the prosecutions themselves violated international law.[138] Second, Congress has enacted a wave of statutes that incorporate the law of nations into federal criminal law.[139] This spate of statutes criminalizing war crimes has relied, in name at least, upon the Offenses Clause.[140] Both trends demonstrate an increasing desire for vigorous prosecution of any and all violators of international law. But these efforts also demonstrate an increasing disrespect for the sovereignty of other nations and, therefore, an increasing disrespect for the jurisdictional rules of international law.

The history, constitutional structure, and case law all indicate that the Constitution requires that the reach of the Offenses Clause be limited by the jurisdictional principles of customary international law. This Note suggests that, to the extent that the Offenses Clause is relied upon as the constitutional basis for these actions, disrespect for international law also signals disrespect for constitutional law.

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138. *See* United States v. Yunis, 681 F. Supp. 896 (D.C. Cir. 1988) (holding that U.S. jurisdiction extends to an alleged saboteur who was accused of activities in foreign airspace, and who had no relation to the United States other than later being found within its borders).

139. *See, e.g.*, 18 U.S.C. § 175 (1994) (criminalizing biological weapons); *id.* § 470 (criminalizing extraterritorial counterfeiting); The Genocide Convention Implementation Act of 1987 (the Proxmire Act), *id.* § 1091 (criminalizing genocide within the United States or by Americans abroad); *id.* § 1203 (criminalizing the taking of hostages inside of or outside of the United States); *id.* § 2332a (criminalizing the use of weapons of mass destruction); *id*. § 2332b (Supp. III 1998) (criminalizing terrorism that transcends national borders); *id*. § 2332c (Supp. III 1998) (criminalizing the use of chemical weapons); *id*. § 2332d (Supp. III 1998) (criminalizing financial support or interactions with countries that support international terrorism); *id*. § 2339A (criminalizing the act of providing support of terrorism); *id*. § 2339B (Supp. III 1998) (criminalizing support of terrorist organizations); *id*. § 2340A (criminalizing torture); The War Crimes Act of 1996, *id*. § 2441 (Supp. III 1998) (criminalizing war crimes by or against Americans).

140. *See* statutes cited *supra* note 7; Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 665 n.211 (1998). The Clause has also been invoked as support for congressional approval of the controversial International Criminal Court. *See* David Stoetling, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 281 (1999) (arguing that "Congress has authority to ratify United States participation in the International Criminal Court" based on the Offenses Clause, just as the Supreme Court relied on the Clause in upholding the congressional choice of war crimes tribunals in *Yamashita*).